No. 53108

101 I.A.

CITY OF CHICAGO, a municipal corporation, Plaintiff-Appellant,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT OF
EDWARD BAH and HELEN BAH, a/k/a Edward Bak and Helen Bak, Defendants-Appellees.	)	COOK COUNTY.
	)	HON. FRANK B. MACHALA.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Pursuant to the provisions of the Unsafe Building Act the City of Chicago obtained a decree against the defendants Edward Bah and Helen Bah for the demolition of a building owned by them. On motion of defendants the court vacated the decree for lack of service on defendants. From that order the City appealed. Defendants have moved to dismiss the appeal on the ground that it is not an appeal from a final and appealable order.

On September 19, 1967, the City filed a complaint in chancery against the defendants. In accordance with the provisions of the Unsafe Building Act (Ill. Rev. Stat., ch. 24, §11-31-1 (1967)), the City alleged that defendants owned a three story building at 1719 West Division Street, Chicago, and that the building was unsafe because of various violations of the Municipal Code of Chicago, and the levying of a fine was not an adequate remedy for the abatement of that nuisance. The City asked for an order giving it the power to demolish the building and for a lien on the property for the cost of demolition. It failed however to serve either one of the defendants with summons or to notify them in any way of the impending litigation. The court entered the decree of demolition ex parte on November

16, 1967, and on January 10, 1968, the building was demolished.

On January 26, 1968, the defendants filed a motion to vacate the decree of demolition on the ground that the court had not acquired jurisdiction over the defendants when it entered the decree since no summons had been served on them. They also asked to be permitted to answer the City's complaint. On the same day the defendants filed a petition for restitution in the same action. In it they asked the court to order the City to pay them the fair value of the premises destroyed, to indemnify them from any suit brought against them as a result of the City's wrongful destruction of their premises and to pay the costs incident to the demolition so that the lien would be removed from the property.

On February 13, 1968, the court entered an order vacating the decree of demolition and giving defendants leave to file their appearance and answer in that cause. In its order the court found that defendants had not been served and that the decree of demolition was void for lack of jurisdiction. The court also sent the petition for restitution to the Chief Justice for reassignment to another court. No action has been taken on that phase of the case. The only action of the trial court now before us is the order vacating the decree of demolition. The City admits that the defendants were not served but nevertheless appeals from an order which did nothing more than vacate the demolition decree.

In its objections to the defendants' motion the City contends that the demolition proceeding in chancery is

rendered moot by the fact that the building has already been demolished. In City of Chicago v. Mulligan Enterprises, 27 Ill. App. 2d 481, 170 N.E.2d 13, upon which the City relies, a fire destroyed a building after the City had obtained a decree authorizing it to demolish the building. The City had not yet taken action toward demolition. We stated that "this fire may have created such damage as to make this case moot." That was an observation not a finding. In the instant case the fact that the City has demolished the building pursuant to the decree and may claim a lien on the defendants' property for the cost of the demolition renders the question of the validity of the decree important. The question certainly is not moot.

The City also contends that the order vacating the demolition decree was entered pursuant to Section 72 of the Civil Practice Act and as such is appealable by virtue of the statute. Ill. Rev. Stat., ch. 110, §72(6) (1967). It has been held however that an order vacating a judgment because of lack of jurisdiction over a defendant should not be considered as a Section 72 proceeding. Mabion v. Olds, 84 Ill. App. 2d 291, 228 N.E.2d 188. In that case the court also held that an order which vacates a default judgment for lack of jurisdiction and which orders the defendant to answer is not final and appealable. The City contends that by filing a petition for restitution at the same time they filed their petition to vacate the defendants were in effect entering a general appearance and thereby waived any objection as to lack of jurisdiction. It is clear that a defendant who appears in an action prior to the time the court enters judg-

ment waives service of process unless he is appearing for the single purpose of contesting jurisdiction, that is, entering a special appearance. In such case the defendant has voluntarily submitted to the jurisdiction of the court prior to judgment and the court has jurisdiction at the time it enters its order. But when the appearance comes after judgment has been entered, the same logic serves only to submit the defendant to the jurisdiction of the court as of the date he appeared, not retroactively as of the date of the ex parte judgment. If the judgment was void when entered, it remains void even after the defendant appears for the purpose of receiving relief from the consequences of the void order -- in the instant case the demolition of defendants' building by the City.

The City cites Lord v. Hubert, 12 Ill. 2d 83, 145 N.E.2d 77, for the proposition that a general appearance after judgment waives defects in the service of summons just as fully as an appearance before judgment. That case is distinguishable from the case at bar. In the Lord case the defendant admitted the validity of the prior judgment and sought to benefit from it. In the instant case quite the contrary is true. Defendants denied the validity of the prior judgment on the ground that they had never been served with summons. On that point there is no controversy. So far that is the only matter which has been passed upon by the trial court. Ours is a reviewing court and until the trial court has determined the other issues involved we cannot consider them. The motion to dismiss the appeal must be allowed.

MOTION ALLOWED

DEMPSEY, P.J. and SULLIVAN, J. concur.

NO. 68-64

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

101 I.A.2d 56

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ATWOOD BAKER and JAMES B. McCLURE, Defendants-Appellants.	Appeal from the Circuit Court of Perry County. Honorable Alvin H. Maeys, Judge Presiding.

Goldenhersh, J.

Defendants were tried by jury in the Circuit Court of Perry County and convicted of the crime of Theft (Ch. 38, sec. 16-1(a)(1), Ill. Rev. Stat. 1967). The court denied defendants' motions for new trial and in arrest of judgment, and sentenced each defendant to the Illinois State Penitentiary for not less than two (2) nor more than five (5) years.

Defendants' sole contention on appeal is that the trial court erred in its denial of pre-trial and post-trial motions attacking the validity of the indictment on the ground that it was returned by a grand jury which was improperly impaneled and sworn.

Although the orders referred to are not contained in the record on appeal, it is alleged in defendants' motions, and The People do not deny, that a grand jury comprised of 23 grand jurors was impaneled and sworn on October 11, 1967; on November 3, 1967 an order was entered reconvening the grand jury on November 10, 1967; on November 10, 1967, a grand jury comprised of 21 members of the grand jury impaneled on October 11, and two additional grand jurors, was impaneled and sworn; there is no order excusing the two grand jurors who were members of

October, but not the November, grand jury, and no order was entered discharging the grand jury which was impaneled in October.

Defendants contend that a grand jury is selected to serve for a period of 18 months, and because the population of Perry County is less than 1,000,000, only one grand jury may sit at any time. Defendants contend further that a grand juror may be impaneled in place of another grand juror only when the latter grand juror has been permanently excused. Relying upon People v. Mack, 367 Ill. 481, defendants argue that because there has been no substantial compliance with the law, the indictment must be quashed.

The People assert, and defendants do not deny, that the two grand jurors added on November 10, 1967, were selected from a supplemental list drawn in accordance with Ch. 78, sec. 9, Ill. Rev. Stat. 1967.

Under the provisions of section 112 of the Code of Criminal Procedure of 1963 (Ch. 38, sec. 112-1, et seq., Ill. Rev. Stat. 1967) it was necessary to impanel and swear the jury only one time, and it was thereafter subject to recall at the order of the court. Under the provisions of section 112-3(c) the court is empowered to excuse a grand juror temporarily or permanently, and if permanently, to impanel another person in place of the grand juror excused.

The Supreme Court has held that the statutes relating to the selection of grand jurors are directory, and not mandatory. People v. Petruso, 35 Ill. 2d 578; People v. Gibbs, 413 Ill. 154. In People v. Gibbs the record failed to show that a grand jury, previously impaneled had been recalled. In holding the indictment valid, the Supreme Court said the purpose of the statute (section 3, division XI, Ch. 38, Ill. Rev. Stat. 1951) was to get an existing grand jury back

into court and upon recall no reorganization was necessary. At page 165, the Court said: "If the result contemplated by the statute has been achieved without prejudice to the substantial rights of the defendant, no one has been injured. (People v. Potts, 403 Ill. 398.) The right of the regularly constituted grand jury to reconvene cannot be said to be dependent upon an order. It is the regularly constituted grand jury for the term for which it was selected and if during the term it does reconvene and perform acts within its legal and constitutional powers the legal efficacy of those acts cannot be challenged on the sole ground that there is no order of record telling an officer to summon the grand jury."

Applying the rule enunciated in the foregoing quotation, and in the absence of a showing of actual and substantial prejudice to the defendants, the judgment is affirmed. The People v. Petruso (supra).

The court thanks appointed counsel for an excellent and thorough presentation of the issues.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

No. 51308

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY,
v.	)	CRIMINAL DIVISION.
CLARENCE CARROLL (Impleaded), Defendant-Appellant.	)	HON. WALTER P. DAHL.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant and one Tony Evans were indicted for murder. In a trial without a jury defendant was found guilty and sentenced to serve a term of thirty to sixty years in the State Penitentiary. Evans was acquitted. Carroll has appealed and contends that he was not proven guilty beyond a reasonable doubt. The facts follow.

On May 30, 1965, at about 7:15 a.m. the body of a white male was found protruding from the passenger side of an automobile parked at 750 West Barber Street in Chicago. The decedent's trousers were ripped and contained no wallet or change. An examination of the body disclosed a bullet wound in the left ear, two bullet wounds in the chest and powder burns on the chest. The coroner estimated that the time of death was about 3:00 a.m. on May 30, 1965.

Detective Robert Wasmund testified that Barber Street is about twenty feet wide and that the tenements on either side of the street are separated from the street only by a narrow sidewalk about three feet wide. He further testified that there was a street light about thirty-five feet east of where the car was parked and another light west of the car.

Henry Thomas who was sixteen years old at the time of the murder lived in an apartment on the second floor of

a building on the north side of Barber Street. He testified that he was watching television at 3:00 a.m. on May 30, 1965, when he heard a noise outside and went to look through an open window which faced Barber Street. Two windows east of that window he saw two Negro men standing next to a parked car. They were talking to a white man sitting inside the car. The two men were standing facing the building in which Thomas lived. He recognized one as the defendant, whom he had seen before. He saw defendant push the white man across the front seat and then climb in on top of him. He saw the other assailant then get into the rear seat and hold the man down by his neck. The next thing he heard were three shots. He testified that he saw three flashes but was unable to see a gun. He further testified that the interior light was on and that he could see the men through the front windshield of the car. He did not notify the police because he was afraid to leave the building. Three days later he identified the defendant at the police station.

Estelle Anderson lived with her nine children in a second floor apartment on the south side of Barber Street. We will summarize her testimony in this paragraph. At about midnight she heard men coming up the front stairs of her building and heard a man ask, "Where am I going now?" She then heard a voice which she thought was that of the defendant say, "In here." At about 3:00 a.m. she heard a man's muffled screams and went to the window. She saw the defendant and another Negro forcing a white man across the street to a car. She recognized the defendant as a man she had seen

three years before when he was being arrested for burglary. She heard the victim plead, "Please don't kill me," but the defendant pushed him into the car and then climbed in on top of him. The other assailant got into the back seat and she saw the defendant press something against the victim's side and heard three shots. She testified that her window was about twenty-five or thirty feet from the car, the street was brightly lighted and she was able to get a good look at the defendant. He was wearing a red shirt and brown trousers. The next day she went to the police station and looked through photographs until she found one which she identified as the man she had seen the night before and whom she recognized as a man she had seen being arrested three years previously. After the police arrested the defendant Mrs. Anderson again identified him in person.

Defendant's defense was an alibi. He testified that he attended a party on May 29, 1965, given by Mrs. Willie Thornton; that he arrived at her apartment, which is about two blocks from the scene of the murder, at about 4:00 or 5:00 p.m. and was there until about 10:00 a.m. the next morning. He testified that he left the apartment twice before midnight to purchase liquor and that he went to sleep about 4:30 a.m. He further testified that he was wearing a loud red shirt and brown trousers.

Mrs. Willie Thornton testified that on the evening of May 29, 1965, Clarence Carroll, Alma Jean Phillips, Edward McGregor, Versie Lee Jones, Benjamin Wrancher and Evelyn Bolden attended a party in her apartment. She testified

that every one was drinking large quantities of beer and brandy and that she fell asleep drunk sometime after midnight. She testified that defendant left her apartment for about ten minutes that night and that he was at the apartment when she awoke the next morning. She further testified that he was wearing a red shirt and dark trousers.

Benjamin Wrancher testified that he stayed at the apartment all night, that when he fell asleep at 2:45 a.m. the defendant was sleeping in a chair, that at 3:30 a.m. Versie Lee Jones returned to get her shoes and that the defendant let her into the apartment.

Edward McGregor testified that he left the party at about 2:30 or 2:45 a.m. with Alma Jean Phillips, that the defendant had been at the party all evening and was still there when he (McGregor) left.

Alma Jean Phillips testified that she left the party with McGregor at about 2:45 a.m. and that defendant was there at that time. Her testimony was impeached by the testimony of Detective Francis Higgins who testified in rebuttal that on June 2, 1965, Miss Phillips told him she left the apartment shortly after midnight.

Versie Lee Jones testified that she was at the party until 1:00 a.m. and that the defendant was also there the entire time. She further testified that she returned to pick up her shoes at about 3:00 a.m. and that the defendant let her into the apartment at that time.

Defendant's sole contention is that he was not proven guilty beyond a reasonable doubt. He contends that

the circumstances under which the two identification witnesses observed the crime afforded great opportunities for mistake and that the possibility for mistake is supported by the fact that several witnesses testified that he was at the party at the time of the crime.

Defendant was identified by two impartial and independent witnesses who had seen him before. Both had ample opportunity to observe and recognize him and both were positive in their identifications. Mrs. Anderson remembered that he wore a red shirt and brown trousers on the night in question.

The positive identification by two unbiased witnesses is contradicted by the testimony of five friends of the defendant. All five were admittedly intoxicated and their testimony varied as to how many times defendant left the apartment and who was present. Wrancher and Mrs. Phillips testified that defendant never left the party, Mrs. Thornton and Mrs. Jones testified that he left once and the defendant testified that he left twice between the time it got dark and midnight. Mrs. Thornton testified there was no dancing at the party, but Wrancher testified that every one was dancing and that he had danced with Mrs. Thornton at least twice. The testimony of Alma Jean Phillips was impeached by a prior inconsistent statement she had made to Detective Higgins. The credibility of testimony is for the trier of fact to weigh and not for a reviewing court. Accepting the verity of the State's witnesses, defendant has been proven guilty beyond a reasonable doubt. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and SULLIVAN, J. concur.

NO. 67-131

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WALLACE NURSING HOME, INC., a corporation, Plaintiff-Appellee, vs. MERCANTILE MORTGAGE COMPANY, a corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of St. Clair County. Honorable John M. Karns, Judge Presiding.

Goldenhersh, J.

Defendant appeals from the judgment of the Circuit Court of St. Clair County entered in favor of plaintiff in the amount of $39,700.00 after a non-jury trial.

In its complaint plaintiff alleges that it sought to borrow the sum of $700,000.00 to finance the erection of a nursing home, defendant agreed to make, or obtain for it, a loan in that sum, the parties executed a loan agreement, it was represented to plaintiff that upon execution of the agreement the funds would be "immediately available", the representations were false, defendant knew them to be false, and plaintiff relied upon them, it elects to rescind the agreement and seeks repayment to it of the sums paid.

Defendant answered, denying any representations made by it were false, denying it was to provide plaintiff with construction money and alleging that it agreed to obtain permanent financing, none of which funds were to be disbursed until the nursing home had been completed.

The testimony shows that plaintiff had employed an architect

to prepare plans for the erection of a nursing home, had made efforts over a period of time to obtain financing for the project, and then consulted an officer of defendant about the matter. Richard Wallace, plaintiff's president, was also president of a corporation which had, over a period of several years, financed home improvement loans with defendant. On January 15, 1963 plaintiff wrote defendant authorizing it "to secure a firm standby commitment" for a loan in the amount of $560,000.00. The testimony shows that defendant was not able to procure such commitment from the lender to whom it submitted the proposal, and on February 5, 1963, Wallace wrote defendant a second letter, authorizing it "to secure a firm standby commitment" to lend plaintiff $700,000.00 to be secured by a note executed by plaintiff and endorsed by Wallace and his wife, and secured by a mortgage and real estate and the improvements thereon.

On February 25, 1963, defendant submitted to plaintiff an instrument agreeing to make a loan on designated land and the improvements thereon. It provided for the execution of a note and mortgage with specified interest and discount rates, and the terms of payment, and was to be effective until March 1, 1965, provided plaintiff notified defendant prior to November 1, 1964, of its desire to complete the transaction.

The commitment was accepted by plaintiff in writing, on March 1, 1963.

Plaintiff's letter of February 5 contained the following language:

> "4. The borrower agrees to pay the sum of $39,200.00 as a loan commitment fee upon issuance of the standby commitment conforming to all terms and conditions hereof. No portion of this fee shall be refundable in any event after issuance of the standby commitment. Upon payment

of the $39,200.00 as stipulated above the standby commitment shall remain in full force and effect for a period of two years."

"11. Enclosed is the borrower's check for $11,700.00 for partial fees and expenses in connection with this application. In the event you tender a firm commitment in accordance with the terms and conditions recited above, said sum of $11,700.00 less $500.00 travel expenses will be credited toward the commitment fee of $39,200.00. If the lender declines this application after making a site inspection, then the sum of $11,200.00 shall be returned to the writer."

The commitment proposed by defendant, and accepted by plaintiff, contained the following provisions:

"21. The balance of the non-refundable loan commitment fee in the amount of Twenty Eight Thousand and no/100 Dollars ($28,000.00) is due and payable to Mercantile Mortgage Company with the issuance of this commitment."

"23. This commitment is subject to completion of construction of the 150-bed one story brick nursing home substantially in accordance with plans and specifications submitted for our examination by Architectural Engineers, Inc., Glenn W. Mantle, Architect, consisting of 10 sheets not dated, and specifications dated July, 1962 and subject to the submission of a Certificate of Occupancy issued by the appropriate officers of the governmental units having jurisdiction thereof plus the supervising architect's Certificate of Completion."

Over defendant's objection, Wallace testified that he and John Revis, his employee, talked with George Rainford, a vice president of defendant, in Rainford's office, that defendant prepared the letter which he signed, he relied on defendant to get construction money, and Rainford "thought he could work it out" with the commitment, he relied on defendant because he had done business with them for 5 or 6 years, Rainford knew plaintiff would be required to borrow the money to pay the loan fee, he did not read the agreement, there was some explanation of the agreement but he was relying on George Rainford

completely and trusted him.

He testified further that George Rainford told him he was getting him the commitment to get the building started.

With commitment in hand, he requested a title company to act as disbursing agent and was told "we didn't have enough money in the commitment to get the building started". Mr. Gracey, a vice president of defendant was present at that time. Wallace called Rainford who told him he had turned the matter over to Gracey and he would have to talk to him about it. He was not told he would have to "go out and get" his own construction money. George Rainford told him this would be his construction loan to get the building started.

Plaintiff obtained both construction and permanent financing from another lender, and demanded from defendant the return of the loan fee.

On cross-examination, Wallace stated that at the first meeting with defendant's representative, at which time his attorney was present, there was discussion of the necessity of his raising funds other than the mortgage money to get the building started, and he had proposed to do this by sale of debentures. Proposed forms of debentures to be issued by plaintiff were offered and admitted in evidence.

Wallace continued to do business with defendant on behalf of his other company until some time in 1965.

Robert T. Gracey, called by defendant, stated that the transaction was a "take out" or "standby commitment", that he did not at any time represent to Wallace that he or defendant would obtain construction financing. He identified a document in which Republic National Life Insurance Company of Dallas, Texas agreed to purchase

the mortgage on substantially the same terms as those set out in defendant's commitment.

Gerald N. Nordstrom, employed by defendant as general or house counsel, testified that he attended the meeting at which Wallace's attorney was present, the nature and purpose of the standby commitment were explained, and it was also explained to Wallace that it would be necessary that he raise other funds since the standby was good only upon completion of the building. At the later meeting at which the commitment was signed, the agreement was explained in detail. Nordstrom stated that, in part, his position with defendant was that of liaison officer between defendant's Home Improvement Division and Charles Rainford, defendant's president, and brother of George Rainford. He considered Wallace "an old and valued home improvement" customer.

Defendant contends that plaintiff has failed to prove fraud, and in Wallace's alleged failure to read the commitment plaintiff failed to exercise the diligence required of it.

Plaintiff argues that the evidence shows a fiduciary relationship between the parties, and defendant has the burden to rebut the presumption of fraud.

In Dombro v. Hugo, 370 Ill. 381, at page 385, the Supreme Court said: "Fraud will not be presumed but must be proved by such clear and convincing evidence that the mind is well satisfied that the charge is true."

In Bennett v. Hodge, 374 Ill. 326, at page 331, the Supreme Court said: "It is agreed all of the following elements must be proved in an action based on fraud: (1) The misrepresentation must

be of a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the statement must be material."

In Johnson v. Lane, 369 Ill. 135, at page 148, the Supreme Court said: "A fiduciary relationship exists where there is special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. It exists where confidence is reposed on one side and resulting superiority and influence is found on the other. (Niland v. Kennedy, 316 Ill. 253; Chance v. Kinsella, 310 id. 515; Campbell v. Freeman, 296 id. 536; Baker v. Baker, 239 id. 82.) Where it is sought to establish a fiduciary relation by parol evidence, the proof must be clear, convincing and so strong, unequivocal and unmistakable as to lead to but one conclusion. (Neagle v. McMullen, 334 Ill. 168; Winkelman v. Winkelman, 307 id. 249; Pillsbury v. Bruns, 301 id. 578.)"

In Johnson v. Fulkerson, 12 Ill. 2d 69 at page 75, the Supreme Court said: "A party in possession of his mental faculties is not justified in relying on representations made when he has ample opportunity to ascertain the truth of the representations before he acts. When he is afforded the opportunity of knowing the truth of the representations, he is chargeable with knowledge. If he does not avail himself of the means of knowledge open to him, he cannot be heard to say he was deceived by misrepresentations."

In the review of a case heard without a jury we are bound by

the rule that the findings of the trial court will not be disturbed unless manifestly against the weight of the evidence. However, when it appears from the entire record that the evidence does not support the judgment, the judgment must be reversed. Stephenson v. Kulichek, 410 Ill. 139.

The terms of the loan commitment do not establish a fiduciary relationship, and the only parol evidence of such relationship is the testimony of Wallace that he had done business with defendant for 5 or 6 years, and relied on Rainford. This falls far short of the proof required, Johnson v. Lane (supra).

Having failed to prove the existence of a fiduciary relationship, plaintiff was required to prove by clear and convincing evidence the elements enumerated in Bennett v. Hodge (supra). From our examination of the entire record we hold that the evidence does not meet the test. Nordstrom's testimony is in direct conflict with that of Wallace and the history of prior negotiations, and the documentary evidence fail to support plaintiff's allegations of fraud.

Plaintiff contends, and the trial court found that the failure of defendant to produce George Rainford raised the inference that his testimony would be adverse to defendant. Mr. Nordstrom testified that he did not know Rainford's present whereabouts or where to reach him but the record does not show whether Rainford is still in defendant's employ. Neither his failure to testify for defendant, nor the failure of Revis to testify for plaintiff are explained and under the circumstances the presumption, if any, arising from defendant's failure to produce Rainford is not sufficient to support the finding of fraud.

We find, based upon our review of the entire record, that the trial court's finding in favor of plaintiff, and the judgment order based thereon are clearly against the manifest weight of the evidence. It is, therefore, our duty to reverse the judgment and remand the cause for a new trial.

Judgment reversed and cause
remanded for a new trial.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

CLE

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 10995 Agenda No. 6-67

Carol Jo Mahan, also known as Carol Jo Bratton,
Plaintiff-Appellee
vs.
Jerry Mahan,
Defendant-Appellant

Appeal from Circuit Court Vermilion County

CRAVEN, J., delivered the opinion of the court.

The defendant appeals a one-year sentence imposed as a result of finding him to be in contempt of court for violating an injunction.

This case started in April of 1965, when Carol Jo Mahan filed a complaint for divorce against Jerry Mahan, alleging cruelty. In April of 1966 an injunction was issued enjoining the defendant, Jerry Mahan, from certain acts not here material, and in October of 1966 a decree of divorce was entered dissolving the marriage. There were no children and, therefore, no rights of visitation involved in the underlying divorce proceeding. In December of 1967 the plaintiff in the divorce action filed a petition alleging destruction of certain of her property

of the State's case, it refused to enter a directed verdict either as to Court I, the charge of murder, or as to Count II, the charge of voluntary

by the defendant in his efforts to enter her residence, and in January of 1968 the court found the allegations to be true and issued a further injunction restraining the defendant from molesting the plaintiff or her property. By subsequent proceedings the defendant was found to have violated the injunction and he was sentenced to ten days in the county jail as a consequence. It appears that he was released on April 3, 1968.

Thereafter a rule to show cause was issued why he should not be held in contempt of court for violating the injunction on April 6, 1968, it being there alleged that the defendant damaged property of the plaintiff, broke a window at her residence, broke the windows and windshield out of her automobile and otherwise engaged in conduct contrary to the writ of injunction. A hearing was held and the defendant was adjudged to be in contempt of court and sentenced to one year in the state penal farm. This appeal is from that sentence for contempt.

The appellant made application for supersedeas pending appeal, and this court denied the motion for supersedeas.

It is urged on this appeal that the defendant was not afforded due process of law in that there was no trial by jury and further in that the trial judge should have disqualified himself because of prejudice.

The appellant relies upon the case of Bloom v. Illinois, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968). In that case the United States Supreme Court reversed the Supreme

Court of Illinois (35 Ill. 2d 255, 220 N.E.2d 475 (1966)) and held that prosecutions for serious criminal contempt are subject to a jury trial under the United States Constitution. The Illinois Supreme Court had held that a jury trial was not available to a defendant in a criminal contempt proceeding.

In the Bloom case, a timely motion was made by the defendant for a trial by jury and that motion was denied by the trial court, and the Illinois Supreme Court affirmed. We do not see that the Bloom decision is applicable here for the reason that the record is devoid of any motion or other timely request by the defendant for a trial by jury. The defendant fully participated in the proceedings below, offered testimony and cross-examined witnesses who appeared in support of the rule to show cause. His contention that the proceedings below amount to a deprivation of due process for want of a jury trial thus has a hollow ring.

It is true, as the appellant suggests, that a judge should not sit in judgment on a case where he is prejudiced against one of the parties. That abstract proposition has no application to this case for the simple reason that the record does not demonstrate any prejudicial conduct by the trial judge, nor do we find any motion or other suggestion that the trial judge was prejudiced or biased so as to require that he disqualify himself.

The appellant, in his brief, suggests in his statement of facts that the plaintiff in chasing whoever on April 6th was engaged in destruction of her property stated it to be "her belief that it was the defendant." The plaintiff's testimony, as abstracted, was that she "went outside and saw Jerry very plainly; . . . ." Her further testimony was that she was "positive of her identification of Jerry Mahan; . . . ." The record is equally conclusive on this point.

The judgment of the circuit court of Vermilion County is affirmed.

(Affirmed.)

SMITH, P.J., and TRAPP, J., concur.

No. 68-36 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

101 I.A.2 230-

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County
ESTELLA MOORE, Defendant-Appellant.	)	

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from the Circuit Court of Winnebago County. Defendant, Estella Moore, waived her right to indictment by the Grand Jury and an information was filed charging her with murder and voluntary manslaughter. The defendant was tried before the court with a jury. A verdict of not guilty to the charge of murder and guilty to the charge of voluntary manslaughter was rendered. The court entered judgment on the conviction in accordance with the verdict of the jury and sentenced defendant to a term of not less than five nor more than 15 years in the Illinois State Reformatory for Women at Dwight.

On this appeal defendant raises two issues. First, whether the court committed reversible error when, at the close of the State's case, it refused to enter a directed verdict either as to Court I, the charge of murder, or as to Count II, the charge of voluntary

manslaughter, or as to both counts of the information. Second, defendant questions whether the State sustained its burden of proving beyond a reasonable doubt that the killing was without lawful justification.

The record reveals that on February 27, 1967, Estella Moore shot and killed Willie Robinson, Jr. The shooting took place in the living room of defendant's apartment. Present in the room at the time of the shooting was David Moore, Jr., defendant's brother, Gertrude Caviness, a neighbor, and Murphy Williams, a friend of both defendant and the decedent. Billy Moore, a relative of the defendant, was in the apartment, but testified that he did not see the shooting, as he was in the bedroom at the time.

The decedent was the father of defendant's youngest child, born out of wedlock. It appears that Willie Robinson, Jr. had gone to the apartment building where the defendant lived to take the child away with him. Defendant saw him approach in the car and went downstairs to the apartment of Gertrude Caviness, to avoid meeting him. The decedent, Murphy Williams and Gertrude Caviness spent sometime together drinking in the defendant's apartment. When she returned to her apartment Robinson threatened to take the baby away with him. The defendant objected because the child had a cold.

An argument between defendant and decedent ensued, during which the decedent struck the defendant in the face. Some of the witnesses testified that decedent threatened defendant with a knife and that she then went to the bedroom and obtained a .22 caliber revolver. When she returned to the living room, it appears that Robinson had taken hold of

Gertrude Caviness and was holding her in front of him as a shield. The testimony is conflicting as to whether Robinson had a knife in his hand either just before or at the time of the shooting and whether he was approaching the defendant threatening her, or whether he was attempting to leave the apartment threatening that he would return and "get" the defendant.

Gertrude Caviness testified that Robinson had a knife in his hand and was holding her as a shield, that as they were backing out of the door, defendant fired the shot that killed Robinson. Gertrude Caviness testified that when Robinson was hit with the bullet he fell, pulling her backwards on top of him. Decedent was found lying on the floor in the doorway of the apartment with part of his body in the hallway and one of his legs inside the door. The witnesses could not agree as to whether at the time of the shooting the decedent had a knife in his hand or whether he had thrown it on a chair or had put it in his pocket.

Defendant, at the close of the State's case, moved for a directed verdict as to each count. The court denied the motion

Defendant's first contention is that it was error not to have granted the motion for directed verdict either as to the count charging murder or as to the count charging voluntary manslaughter. Defendant claims this was error because she could not have been guilty of both murder and voluntary manslaughter as a matter of law, and that the court should have dismissed one of the two charges, if not both.

She further asserts that she was prejudiced by the failure to dismiss the murder charge, for in order to prove that she was not guilty of murder, she had to prove that she was guilty of voluntary manslaughter.

The Criminal Code, ch. 38, sec. 9-1, Ill. Rev. Stat. (1967) defines the crime of murder as follows:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another, or . . ."

Voluntary manslaughter, under the Code, sec. 9-2, is defined as follows:

> "(a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person."

The Criminal Code, sec. 7-1, defines the justifiable use of force to the extent of being self-defense as follows:

> "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony."

Defendant contends that, being faced with the problem of proceeding [illegible] facts that would exonerate her of the murder charge [illegible] need merely had to prove that her acts constituted voluntary manslaughter. With this contention we cannot agree. Every defendant charged with murder may defeat that charge in one of several ways. First, and most

obvious, would be to present facts from which the jury could conclude that defendant had taken no part in the alleged homicide. If the facts show that defendant had taken part, the affirmative defense of self-defense may be established and the jury could find under Section 7-1 of the Criminal Code that the force used by defendant was, under the circumstances, justifiable. If the facts are not sufficient to establish justification, possibly the facts might sustain a defense that it was not murder but involuntary manslaughter. Finally, defendant may defend against the murder charge by presenting facts from which the jury would conclude that the crime was that of voluntary manslaughter.

There is no provision of the statute nor rule of procedure that prevented the defendant in this case from putting before the jury facts from which it reasonably could have concluded that defendant was guilty of neither murder nor voluntary manslaughter. The dilemma of the defendant is caused, not by the statutory provisions but by the fact that witnesses testified that she shot the deceedent in self-defense. Defendant could not prove justification, not because she was [illegible] not a murder and a voluntary manslaughter charge, but because the facts would not support a defense of justification.

The facts defendant had to work with. [illegible] might were sufficient for the jury to find her guilty of voluntary manslaughter beyond any reasonable doubt. To have required the trial court to grant either the motion for directed verdict on the murder charge or, in the alternative, on the voluntary manslaughter charge would require the judge to take from the jury the question of fact as to whether under the evidence the State had proved beyond a reasonable doubt that de-

fendant was either guilty of murder or voluntary manslaughter.

It is for the jury to determine whether the evidence would sustain the charge of murder or whether under the evidence the defendant is guilty of some lesser homicide. To adopt the argument of defendant would be to take from the jury its right of deciding questions of fact based upon the evidence presented to it. Whether in this case defendant was guilty of murder or of voluntary manslaughter depended upon the weight given to the testimony of the various witnesses. Apparently, in this case the jury determined that under the facts defendant was not guilty of murder but was, beyond a reasonable doubt, guilty of voluntary manslaughter.

It is equally evident that the jury concluded that there was not sufficient evidence to raise a doubt as to whether the defendant's action was justifiable on the basis that she acted in self-defense.

We do not consider it necessary to rule against the defendant on the fact that after the motion for directed verdict was denied, defendant continued and presented evidence in the case and, therefore, waived any error that might have existed as a result of the denial of the motion. The People v. Slaughter, 29 Ill. 2d 384, 389; The People v. Washington, 23 Ill. 2d 546, 548.

We find no merit in the contention of the defendant that she was prejudiced in any way by the case having gone to the jury on both counts. It has been held that under an indictment for murder a defendant may be found guilty of manslaughter and that such a verdict is not only a conviction of manslaughter, but an acquittal of the charge of murder and that to try the two in one action is not improper. The

People v. Lewis, 375 Ill. 330, 334. People v. Johnson, 54 Ill. App. 2d 27, 37.

Finally, defendant contends that the State did not sustain its burden of proof that the acts of the defendant were not justified. There is no doubt that whenever evidence of self-defense is introduced, whether as part of the State's case, or as a result of an affirmative defense interposed by defendant, the burden of proving guilt beyond a reasonable doubt as to that issue as well as all the other necessary elements of that charge is upon and remains upon the State. The People v. Warren, 33 Ill. 2d 168, 173. Whether a killing is justified under the law of self-defense is a question of fact to be determined by a jury under the proper instructions. People v. Washington, 54 Ill. App. 2d 467, 470.

As can be seen from a review of the evidence there was some conflict in the testimony particularly in regard to whether the decedent just before the shooting was attempting to attack the defendant or was attempting to retreat from her and as to whether at the time of the shooting he was threatening her with a knife. From the evidence it appears that decedent had threatened defendant with a knife but several witnesses testified that shortly before the shooting he had put the knife in his pocket and was in fact attempting to leave the apartment. The jury obviously decided the question of credibility in favor of the State's witnesses and that determination will not be set aside by us under the circumstances in this case. We have examined the evidence in detail to ascertain whether it furnishes support for the jury's verdict. It does. People v. Willie Dorsey, First District, Case No. 51777, _____ Ill. App. 2d _____.

In the case before us, we find that the State presented sufficient evidence to sustain the jury's finding and verdict and that the State met its burden of proof. The People v. Jordan, 16 Ill. 2d 489, 492. Our review of the record shows that defendant's guilt of the crime of voluntary manslaughter was established beyond a reasonable doubt and that there was no reversible error.

The judgment of the Circuit Court of Winnebago County is therefore affirmed.

JUDGMENT AFFIRMED.

MORAN and DAVIS, JJ., concur.

No. 53167

GERALDINE P. KUHNS, now known as GERALDINE P. ELLISON, Respondent-Appellant,	)	APPEAL FROM THE
v.	)	CIRCUIT COURT
DONALD P. KUHNS, Petitioner-Appellee.	)	OF COOK COUNTY.
	)	HON. FRED G. SUSIA, JUDGE.

PER CURIAM.

Plaintiff appealed from an order modifying the child custody provisions of a divorce decree. The appeal was dismissed in this court on motion of the appellee and the appellant now importunes us to reconsider our prior order and reinstate the appeal.

The parties to this action were divorced on July 5, 1965, and the custody of their four minor children was awarded to the plaintiff. On May 3, 1968, defendant filed a petition for modification of the custody order, alleging that the plaintiff took the children and in the company of one Robert Ellis, a fugitive from justice, left Chicago on April 26, 1968. Defendant charged that during the period from April 26th to April 29, 1968, plaintiff and Ellis lived in at least five motels with the children and that on April 29, 1968, they were found in the Holiday Inn Motel in Moline, Illinois. On that date the plaintiff placed the children on a plane and returned them to the father, with whom they have remained until the present time. The husband further charged that plaintiff habitually committed adultery, that she abandoned the children for long periods of time, that she was addicted to pills of an unknown kind but of an allegedly dangerous nature, that she was habitually intoxicated, that she was violent toward

the children and that she had attempted to commit suicide.

On May 3, 1968, the trial court entered a temporary order giving the custody of the children to the father "until the further order of the court." The court then continued the case until May 17, 1968. On that date plaintiff filed a petition praying that the temporary custody order be vacated and the children be returned "until a full and complete hearing by the Court." The court after hearing arguments denied the petition. Plaintiff was given twenty days to answer defendant's charges of misconduct and the court further ordered that the children be present in person at 8:30 a.m. on May 22, 1968, so that a hearing could be held with respect to visitation rights.

On May 21, 1968, the day before the scheduled hearing, plaintiff filed an answer to defendant's charges of misconduct. The answer is intricate and cautiously worded. Plaintiff admits that she sent the minor children to stay with their father but states that she did so for their temporary safety. As to the alleged affair with Ellis, plaintiff avers that she <u>believes</u> that Ellis was a "set-up," that he was in collusion with the defendant in an attempt to stage a compromising situation and that she had had no intention of going with Ellis but was overpowered by him. With these and other charges and countercharges the parties joined issue. A hearing on visitation rights was scheduled for May 22, 1968 and a full hearing on fitness was set for a later date. On May 22, 1968, plaintiff filed her notice of appeal and removed the matter from the jurisdiction of the trial court. It appears that at

this time the only impediment to a hearing on the issues is the plaintiff's appeal.

Appellant cites Schneeman v. Schneeman, 317 Ill. 286, 45 N.E.2d 1016, for the proposition that an order changing child custody, even if temporary, is always appealable. In that case the trial court ordered the father to relinquish custody of his daughter over the Christmas holidays. The father did not acquiesce in the change of custody, but the trial court nonetheless ordered that the minor child be transferred to the care of her grandmother for the period of time in question. In the instant case the appellant, by her own admission, relinquished custody of the children to their father. She thereby gave her consent to the temporary change of custody at least pending the resolution of the emergency created by her conduct, and any permanent change in that custody arrangement must be made on the basis of evidence taken by the trial court. Such a hearing should be held forthwith. The action of this court in dismissing the appeal cannot be construed as depriving the appellant of the right to present her claim for custody. She herself has delayed the hearing which the trial court is prepared to give her. The motion to reconsider is denied.

MOTION DENIED.

M-52281-52282

101 I.A.2 286-1

THE CITY OF CHICAGO, a Municipal Corporation, Plaintiff-Appellee, v. JO ANN WILLIAMS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY, FIRST MUNICIPAL DISTRICT. Honorable Joseph C. Mooney, Magistrate Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

In a jury trial, defendant was found guilty of the offenses of disorderly conduct in violation of Chapter 193, section 1, and of resisting arrest in violation of Chapter 11, section 33, of the Municipal Code of Chicago. She was fined $50 and $75 respectively. On this consolidated appeal, defendant asserts trial errors and misconduct of the prosecution which she contends made it impossible for her to receive a fair trial.

On the evening of May 7, 1966, three boys, John Williams, Michael Oakley and Tyrone Douglas, went to a restaurant at 2201 South State Street to collect their pay for work they had done for the owner. An argument ensued, and John Williams, 15 years of age, went home to get his mother. She was not there, and his two older sisters, Phyllis Williams and the defendant, Jo Ann Williams, returned to the restaurant with him. Phyllis Williams asked the restaurant owner why he did not give the money to the boys and, after some dispute, the mother of the restaurant owner called the police.

Officers Silas and Giltmier arrived at the restaurant shortly after nine o'clock and, as juveniles were involved, decided to transport them to the 21st District police station. The three boys were then taken to the squad car of Officer Silas, which was parked on State Street. Defendant, Jo Ann Williams,

telephoned home, where she left a message for her mother. She then walked over to the squad car of Officer Silas, where her brother was seated. She attempted to get into the squad car, and she stated she was going to the police station if her brother went.

Officer Silas testified that when he ordered her out of the car, she used profanity and got out of the squad car and slammed the door. He then got out of the car and placed her under arrest for disorderly conduct. He grabbed her on the shoulders, and she said, "Let me go," and used more profanity and stated he tore her coat. He turned her over to Officer Giltmier, and he grabbed her by her arm and coat--"She was struggling and calling us both names. There was a crowd of people, teenagers, juveniles and a few adults. They were making noise. Officer Giltmier took her and said, 'You are under arrest' and she asked for what, and I think disorderly conduct was stated." Officer Giltmier's car was parked around the corner on Cermak Road, and she was struggling as he took her to his car.

On cross-examination, Officer Silas testified that he weighed about 210 pounds, and she weighed about 100 pounds; also, that prior to her coming to the car, he had no intention of arresting her and did not arrest her because she tried to get in the car or because she slammed the door. On redirect, he testified, "I arrested her for disorderly conduct based upon her shouting obscenities in public to me and screaming and yelling, creating a public disturbance. I did not place Jo Ann Williams in custody when we went out of the restaurant. * * * I did not strike her at any time."

Officer Giltmier testified that pursuant to a radiogram, he proceeded to 2201 South State Street. He was greeted by Jo Ann Williams and her sister, who said, "you can't arrest them, you have no warrant." He asked the restaurant owner what the

problem was, and he decided that the matter was out of his jurisdiction and belonged to a juvenile officer. It was his decision to take the three boys and the restaurant owner to the station and to turn them over to the juvenile officer for further processing and disposition of the matter. He informed Jo Ann Williams and her sister to go home and notify their parents that the boys would be detained under arrest for investigation of criminal damage to property. Officer Silas put them in a squad car. Jo Ann Williams was yelling obscenities at Officer Silas, including "You are not going to take him. You son of a b----. If you are going to take him, you're going to take me too." She tried to get in the auto while shouting obscenities. Officer Silas told her to close the door, and she slammed it.

Officer Giltmier testified, "Officer Silas got out of the car. I started towards her and Officer Silas grabbed her around the shoulders from the front. I took her from behind. Officer Silas gave her to me. I grabbed her about the shoulder, using her coat to grasp and I told her she was under arrest and was going into the station. She was moving her arms and attempting to kick. Officer Silas did not throw her hard or throw her to the ground. He pushed her to me. I had her from the back. I did not have her body. I was grasping her coat. I attempted to take her to my squad car parked up the street on Cermak. A large crowd was present. I took her forcefully, sir, she fought me all the way. She was hollering. She was flailing her arms, attempting to kick me with her feet and squirming--generalized movement of the body. She broke away from me once going to the car where I had to regrasp her."

When they got to the car, there was a large crowd of more than fifteen people. Officer Giltmier unlocked the car, and defendant "started to tug away from me again, and I had to pull back because I was off balance * * *. I counter-acted her

pull using force toward me but I did not give no violent pull towards me. The street was slippery at the time. She hit the car with her face. She was bleeding from her mouth. I let her go at that time. She did not try to run away at that time. I was punched from behind. My hat flew off. I turned around and let a fist fly in the general direction of the punch and I hit somebody. I don't know who I hit. I opened the door and said, 'Get in, Jo Ann.' She got in and gave no resistance. Her sister came up and said 'You hurt my sister. I want to go with her.' I opened the back door and let her in. * * * The crowd was crowding all the time, hollering 'police brutality,' calling me foul names, * * * I was upset."

Under cross-examination, Officer Giltmier testified that Officer Silas told defendant she was under arrest, and "I arrested her." He took her by the coat and later saw that it was ripped to the seam. The profanity of defendant was about the same outside as it was in the restaurant. The difference about her conduct outside was that she was exciting the crowd by saying, "this is police brutality." He weighed 190 pounds. Approaching the car she was constantly struggling. He knew defendant was injured--"she received a bloody mouth first of all, and her bridge was loose. She had a partial plate or bridge." He also said defendant's resistance caused him to lose his balance, and the wet streets were a contributing factor--"I lost my balance--Jo Ann hit the door. Her feet came out from under her. * * * It all happened in a continuous series of events."

Defendant Jo Ann Williams testified that she went to the restaurant with her sister Phyllis. They had a conversation with the restaurant owner and his mother about wages due the three boys. Three police officers arrived and two remained. Phyllis, 21 years old, did the talking. Defendant used no profanity anddid not participate in the conversation. Officer Silas had a telephone conversation and then said to bring everybody to the station.

After leaving the restaurant, defendant walked over to the car of Officer Silas, where the three boys were in the back seat. She opened the front door and bent down to get in. She told Officer Silas she was going to the police station if her brother were. The officer told her she was not going anywhere. He swung at her with his stick, and "I jumped out of the way and closed the door pretty hard. I did not say any of those words he testified I used when I got in the car. He jumped out of the car. * * * He shoved me over to the other police and said, 'She wants to go to jail. Take her.' He pushed me over to Officer Giltmier. He grabbed both of my arms and started pushing me around the corner toward his car. He took both my arms and twisted them behind my back. * * * He was picking me up. I told him to put me down. I told him I could walk. My feet wasn't touching the ground. I told him he was tearing my coat to let me go, he was hurting my arm. He never said I was under arrest. Officer Silas also never said I was under arrest." When they arrived at his car, "He threw me into the car. My face hit the top of it, right up over the window. * * * I was not trying to avoid being placed in custody. I was trying to go to jail anyway with my brother. I was moving because he was hurting my arms. The lower part of my mouth was stuck out and I had a partial plate and all of the teeth were out of it and so was another one of my teeth got knocked completely out."

At this point the counsel for the City objected, stating, "To pursue the injury is only to raise sympathy for the defendant. It has no bearing. Her injury has no bearing on whether or not she committed disorderly conduct and resisted her arrest. * * * let her file a civil suit."

Out of the presence of the jury, and after considerable colloquy between court and counsel that defendant's injuries had no bearing on the instant case, the court stated, "My sole concern

is whether this jury has been prejudiced. This jury has been sitting in the civil court for two weeks. Some of them or most of them have heard civil cases. If this jury were out in the Criminal Court Building I would declare a mistrial but under these circumstances I am fully aware that they are cognizant of the right of the defendant to bring a civil action without any assistance or encouragement from counsel. This is not prejudicial. It is a side remark, so characteristic of the trial where we have had nothing, as the record will show, and I hope the Supreme Court reads it. Where there has been a succession of colloquy between counsels, so much so that the trial at certain stages has resembled a barroom brawl. And if I were to hold any one single remark made during this trial as prejudicial error, I doubt if we could have gotten beyond the first witness. So if this is prejudicious to the jury one way, other errors have prejudiced the jury the other way. I think, however, it will become a substantially just decision. * * * We want to allow them to rebut what is already in evidence. We don't want anything inflammatory or prejudicial, however just it may be, to get before this jury when ultimately it will go before a civil jury in reference to damages. So, we have to work out questions in this area: First of all, bleeding; Second, one tooth knocked out; four loose; a bridge knocked out and destroyed; testimony as to spitting; conversations in the automobile to the station; any pain and suffering she may have noticed about her at that time, and that is all." Later, in the presence of the jury, the court stated, "The objection has been taken care of in conference, so we will strike the objection and proceed."

After the foregoing ruling of the court and the continuation of defendant's direct examination, the court permitted a number of questions regarding her teeth and "the things you noticed about your mouth at the time of the incident." She stated her mouth was bleeding, and her face was numb.

She further testified that when the officer opened the door, she got into the police car on the front seat. In response to the question as to whether she was spitting, she replied, "No, my blood was running out of my mouth on the floor of the car. It was on the seat," and she did not spit on Officer Giltmier. She identified the coat she had beenwearing prior to the incident, "it did not have the tears and the blood on it." She denied using profanity to Officer Giltmier and said she couldn't talk "because the lower part of my mouth was disfigured." She further denied using any profane language from the time she left the restaurant and walked to the car of Officer Silas.

Other witnesses for the defense included her brother, John R. Williams, her sister, Phyllis Williams, Michael Oakley, one of the three boys, Stephanie Oakley, his sister, and Celeste Townsend. These were all occurrence witnesses and all testified in detail as to the facts leading up to the arrest of defendant. They did not hear her say anything profane, and she did not struggle with either officer, and Officer Giltmier pushed defendant against and into the car. John Williams testified that when defendant closed the car door, Officer Silas said, "If this little b---- wants to go to jail, I'm going to take her but not in this car." Also, "She wasn't doing anything while Officer Giltmier was taking her away. She was saying, 'Let me go.' She was kind of screaming. She was in pain. You could look at her face and tell. I saw them for only a short distance."

Considered first is defendant's contention that (1) reversible error was committed in excluding evidence concerning injuries received by defendant during the course of her arrest, and that (2) the injuries and conduct of the officer who inflicted them were relevant factors affecting the credibility of the prosecution witnesses.

Defendant argues that "the serious injuries which the defendant sustained during the alleged arrest were part of the

res gestae. They were inextricably connected with the events which took place and were necessary for understanding the testimony of the police officers. The trial judge's constant admonitions suppressing references to the injuries were confusing and misleading. It must have appeared to the jury that counsel for the defendant was deliberately violating the Court's rulings every time that injuries were mentioned."

Defendant further argues that "the criminal and civil liability of Officer Giltmier for his actions related directly to his self-interest in the outcome of the case and his credibility as a witness. These were not slight injuries and it is submitted that the defense should have been permitted to introduce evidence and make argument that no arrests would ever have been made if the defendant had not been seriously injured. The Court not only effectively excluded evidence of the serious nature of these injuries but it misled the jury as to the relevancy of the injuries. Its rulings foreclosed a most important defense attacking the interest and credibility of the prosecution witnesses on final argument. The error was prejudicial to the defendant."

Defendant's authorities include 15 I.L.P., Criminal Law, § 462, where it is said (p. 45):

> "The fact that a witness is interested in the outcome of the case should be considered in evaluating his testimony. This rule applies to the accused whose obvious interest must be taken into consideration, but whose testimony cannot be disregarded merely because he is the accused.
>
> "Generally, the positive testimony of a credible witness which is uncontradicted and unimpeached by positive or circumstantial evidence, intrinsic or extrinsic, cannot be disregarded, but must control the decision of the court or jury. However, the rule does not apply if there is an inherent improbability in the testimony of the witness."

The prosecution contends that the alleged excluded evidence was testimony as to the extent of defendant's injuries, and from an occurrence subsequent to defendant's arrest; that the evidence was immaterial and irrelevant to the issue of defendant's

guilt and was no more than an attempt to elicit sympathy from the jury. The prosecution also asserts that "after being initially restrained from presenting such testimony, defense counsel was allowed to present extensive testimony concerning the details of the injury. * * * Assuming it was error to exclude such testimony, it is well established that such exclusion is harmless error where the information sought was admitted at another point in the trial." In support is cited People v. Armstrong, 80 Ill. App.2d 77, 224 N.E.2d 675 (1967), where it is said (p. 86):

> "This evidence was admissible, and it was error to sustain the State's Attorney's objection to its introduction. The matter was fully examined, however, on the direct and cross-examination of the defendant, and he was not prejudiced by the exclusion of evidence which was in fact admitted at another point in the trial."

On the issue of evidence as to the extent of defendant's injuries, the record shows that hearings were held, out of the presence of the jury, in an effort to agree upon proper and adequate testimony on this point. Although the trial court had considerable doubt as to the propriety of such testimony, the extent of defendant's injuries was fully placed before the jury by the end of the trial. We conclude defendant was not prejudiced by the exclusion of such evidence earlier in the trial, and the jury had ample opportunity to consider what bearing, if any, this evidence had upon the credibility of the police officers. We find no prejudicial error in this area of the trial.

Considered next is defendant's contention of prejudicial misconduct by the prosecution, which made it impossible for the defendant to receive a fair trial. As to this contention, initially defendant asserts that the charges against her were tried by an all white jury. Defendant argues, "Successful exclusion of any Negro from service on the jury had been accomplished by the prosecution. The defendant and all of her witnesses were Negroes. These facts alone, of course, are not claimed as a basis for reversal. However, they do become important when taken in the total context of the trial. The

cumulative effect of the misconduct of the prosecution, including its witnesses, coupled with the erroneous rulings of the trial judge, made it impossible for the defendant to receive a fair trial. Motivating the misconduct of the prosecution undoubtedly was an obvious effort to play upon the fears and prejudices of the jurors toward riots, civil rights, phony police brutality charges and brain power of Negroes, as will appear from the various examples following. The most atrocious example of misconduct was the prosecutor's sneering secret comment to some jurors that one of the important defense witnesses had 'no brain to work with.'"

As to these charges, we note that the record contains nothing on which to base the assertion that Negroes had been systematically excluded from service on the jury in the instant case, nor does defendant point out anything in the record on which to base such a charge. Therefore, we find no merit to this contention.

We examine next the charge made that the prosecutor made a sneering remark to some of the jurors about one of the important defense witnesses. The record indicates that the remark was brought to the attention of counsel for the defendant after the trial was over by a spectator whose testimony and affidavit were presented at the hearing of a post-trial motion. Mr. Blumershin, defendant's witness, testified that the prosecutor made the remark with his head down and did not look at the jury. Mr. Blumershin saw one of the jurors smile and another turn and look, and on that basis he thought they heard the remark. He said that the prosecutor was closer to the jury than to himself but was directly facing him. At the hearing, this witness said (apparently to the prosecutor): "I think it is quite possible, as I recall, you said this with your head down. You weren't indicating and you did not look at the jury, so I think it is quite true you would not know whether the jury

heard it. When I heard you say that, I did look at the jury, because I was shocked. And to say if they heard it--I saw one juror smile and one turn and look at you when he had been looking up at the front where the real action was going on, which indicated that he heard you--or he or she--I am not sure which one it was. So that was why I said that, because that indicated to me that the jurors had heard what you said."

On this point the prosecutor was sworn and testified, "I did not say anything in the manner in which Mr. Blumershin described it." On cross-examination, the prosecutor testified, "To the best of my knowledge, I didn't say it. * * *."

As to this charge, the prosecution cites People v. Berry, 18 Ill.2d 453, 165 N.E.2d 257 (1960), where it is said (p. 459):

> "While the conduct of the prosecutor in thus speaking to the jury cannot be condoned, it is clear that it does not constitute reversible error. In order to justify setting aside the verdict of a jury because of an unauthorized communication with them, it is necessary to show the defendant was prejudiced. * * * Here there was no mention of the case or any part of it, nor has defendant suggested any other facts to show that prejudice resulted."

We agree with the prosecution that defendant has failed to show that the remark, if made, was effectively communicated to the jury, or any relevant facts to show that prejudice resulted from the remark. We find no reversible error here.

Defendant's next contention is that not only did she not receive a fair trial, but that she was not proved guilty by a clear preponderance of the evidence.

Although we note that defendant's witnesses were more numerous than the witnesses for the prosecution, we believe the rule to be applied here is set forth in People v. Coulson, 13 Ill.2d 290, 149 N.E.2d 96 (1958), where it is said (p. 295):

> "This resume of the testimony shows that the evidence relating to the material facts in issue was conflicting and cannot be reconciled. Under such circumstances it is the duty of a jury, or of a court sitting without a jury, to determine the credibility of the witnesses and the weight to be given their testimony, and on review,

> this court will not substitute its judgment for that of the jury or trial court. * * * But it is always the duty of this court to examine the evidence in a criminal case, and if it is so improbable or unsatisfactory as to raise a serious doubt of defendant's guilt, the conviction will be reversed. * * * A judgment of conviction can be sustained only on credible evidence which removes all reasonable doubt of the guilt of the defendant, and it is the insufficiency of the People's evidence that creates such doubt. If a conviction is to be sustained, it must rest on the strength of the People's case and not on the weakness of the defendant's case."

Applying the foregoing guidelines to the instant case, and under the facts and circumstances appearing in the record, we cannot say that the testimony of the two police officers is so improbable, unreasonable or unworthy of belief as to require this court to substitute its judgment for that of the jury. In order to fairly evaluate the testimony of Officer Giltmier, the jury was adequately informed as to the injuries received by defendant and as to the conduct of the officer during the incident.

Finally, we consider defendant's charges of misconduct by counsel for the prosecution throughout the trial, and "his flippant and impatient attitude which demeaned the court and trial of the defendant."

This record shows considerable irregularity and a number of exchanges of remarks between counsel for both sides, which were either unnecessary or sarcastic. The trial court was called upon to rule upon numerous objections and technical questions and, as previously noted, the court commented, out of the presence of the jury, that the trial resembled a barroom brawl. However, the record indicates that no material evidence was kept from the jury, and it was fully informed of facts which might have affected the credibility of the witnesses.

This case calls for the application of the statement, "The object of review by this court is not to determine whether the record is completely free of error but to ascertain whether upon the trial there has been such error which might prejudice the rights of a party." Moore & Co. v. Champaign Nat. Bank, 13 Ill. App.2d 232, 246, 141 N.E.2d 97 (1958).

As we find no prejudicial error here, and for the reasons given, the judgments of the Circuit Court of Cook County are affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

51326

ELEANOR B. ROTH, Counter Plaintiff-Appellant, vs. G. WALLACE ROTH, Counter Defendant-Appellee.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE HARRY G. HERSHENSON, Judge Presiding

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an "order and modification of a decree" entered February 8, 1966. The order denied Eleanor B. Roth's motion to strike and dismiss the counter-petition filed by G. Wallace Roth, and allowed the prayer of the said counter-petition in part by relieving G. Wallace Roth from the obligation of complying with certain settlement provisions embodied in a decree of divorce entered on July 25, 1963.

On January 9, 1963, G. Wallace Roth [hereafter referred to as appellee] filed a complaint for divorce in which he charged Eleanor B. Roth [hereafter referred to as appellant] with desertion. On February 5, 1963, the appellant filed her answer to the complaint and a counterclaim for separate maintenance. The appellee filed his answer to the said counterclaim on February 25, 1963.

On July 23, 1963, the appellant filed an amended counterclaim for divorce. The divorce decree was entered on July 25, 1963. On November 4, 1964, appellant filed a petition alleging that the appellee had wilfully failed and refused to pay her the sum of $100 per month due on a note of $3,000, as provided by paragraph 2 of a property settlement agreement entered into by the parties. The agreement also contained the following paragraphs:

5. Wallace acknowledges that there is presently pending in the Probate Court of Cook County a certain cause #60 P 4473, Docket 616, Page 540 entitled In the Matter of the Estate of Norbert William Jeran and that the will, which has been duly admitted to probate, establishes a testamentary trust, described in said will as Trust B. Wallace further acknowledges that the res of said Trust B consists of assets having a present market value of approximately Ninety Thousand Dollars ($90,000.00) and further that under the terms of said testamentary trust, he and his brother, Robert R. Roth, will each receive Fifty Percent (50%) of said Trust B upon the death of their mother, Lydia J. Roth, who has a life interest in the income therefrom.

Wallace agrees to execute an irrevocable assignment in favor of Eleanor directing the Harris Trust and Savings Bank (or its successor in trust) as trustee of the aforesaid trust to pay to Eleanor, upon the death of Wallace's mother, Lydia J. Roth, an amount equal to Fifty Per Cent (50%) of his then interest in Trust B aforesaid. Wallace further agrees to obtain from his brother, Robert R. Roth, a release of any and all claims which Robert may have or hereafter claim to have as a contingent remainderman with respect to said trust. In the event of Wallace's remarriage (if the parties hereto are divorced and Wallace thereafter remarries), he further agrees to enter into an antenuptial agreement containing a waiver and release by any such subsequent spouse to any and all right, title, claim, demand or interest in and to the foregoing assignment by Wallace of Fifty Per Cent (50%) of his aforesaid vested remainder.

In the event Wallace's brother, the aforesaid Robert R. Roth, predeceases his mother, Lydia J. Roth, leaving no spouse or issue him surviving, thereby enhancing Wallace's inheritance, Eleanor acknowledges that she has no claim to such additional increment and agrees not to assert any right, title, claim, demand or interest with respect thereto.

6. Wallace agrees to maintain insurance on his life in the sum of Twenty Five Thousand Dollars ($25,000.00) and to nominate and maintain Eleanor as the beneficiary thereof until the death of Wallace's mother, Lydia J. Roth.

To the petition the appellee filed an answer and counter-petition on January 18, 1965, in paragraphs 2, 3 and 4 of which he seeks modification of the decree insofar as it provides that he pay the appellant the amount due on the note and that he pay her the sum of $25,000 out of an inheritance from his uncle's estate. The reason assigned for the modification of the decree was that the appellant made "fraudulent, deceitful misrepresentations" for the purpose of having the provisions referred to incorporated in the decree. In his counter-petition

appellee alleges that he agreed to the provisions in question because of certain representations allegedly made by the appellant as follows: a) What would she do in her old age? b) She might not be able to work forever. c) She had no marriage plans for the future. d) She felt insecure financially and needed some immediate supplemental income plus something for her future.

The counter-petition also stated that appellant had married a man of considerable means which eliminated the basis on which appellee had agreed to the certain provisions in the decree. On October 26, 1965, the appellee filed an amended petition in which he alleged that the appellant had voluntarily made misrepresentations on various dates on or about July 23, 1963, during pre-trial conferences before the judge, including "a denial of marriage plans for the future," and that as a direct result of such representation "the Court prevailed upon Petitioner, through suggestions and admonitions, in reliance upon said misrepresentations, to enter into said property settlement agreement, particularly Paragraphs 2, 5 and 6 thereof, . . ."

In support of the counter-petition appellee filed an affidavit setting forth the representations heretofore mentioned, also appellant's statement, "It is ridiculous to think that I have any marriage plans. I do not have any marriage plans."

Appellant filed a motion to strike and dismiss the petitions, which the court denied after a hearing. Appellant also filed a motion and amended petition for rule to show cause, in which amendment she asked, among other things, for attorney's fees for the prosecution of her petition.

On March 17, 1966, the court held a hearing and heard witnesses. The appellant at first objected to the hearing,

but participated in it through her attorney and introduced documentary evidence. In McKinney v. Nathan, 1 Ill. App.2d 536, the court said at page 543:

> "The parties may, by the introduction of evidence or their conduct in the trial, waive formal pleadings or form their own issues on the evidence introduced, and they may voluntarily present under the evidence issues not presented by the pleadings. An objection that a certain matter is not an issue under the pleadings or that it is not denied or properly denied may be waived by a party where he introduces or brings out evidence bearing on the subject, or tries the case as if the matter were not [sic] in issue."

This rule goes back to the rule prevailing under the common law pleading practice in Illinois. Puterbaugh, Common Law Pleading and Practice, 10th edition, section 120; Unity Co. v. Equitable Trust Co., 204 Ill. 595,599; Head v. Wood, 20 Ill. App.2d 97, 103; Mooney v. Lloyd's, London, 33 Ill.2d 566, 570.

In the instant case the appellee's former attorney was one of the witnesses at the hearing, and he testified that during the conference prior to the entering of the original decree, Mrs. Roth had stated, among other things, that "she had no plans and intentions of remarrying, and requested that a substantial settlement be afforded for her for the foregoing reasons. She denied that she had any marriage plans."

The attorney-witness then testified that the court had stated that since Mrs. Roth had denied any intention of remarrying, the attorney for appellee had no basis for relying on an argument that the settlement was inequitable by reason of the likelihood of a remarriage. The judge of the court then said he wished to give his recollection of what transpired at the conferences, and this was objected to by the attorney for appellant. The attorney further testified

that the judge stated that in his judgment, unless those matters or provisions were included there was no likelihood or possibility of settling the matter.*

It is worthy of note that the decree of divorce was entered on July 25, 1963, and that in December of 1963 the appellee remarried. Thirty-one days after the decree of divorce the appellant married George V. Brown. The appellee testified that he had known Brown since 1947 and had introduced him to the appellant in 1948 or 1949; that he had worked with Brown as an attorney.

The court stated: ". . . within a period of 31 days from the date of the entry of this decree, Mrs. Roth married a mutual friend whom they had both known and with whom Mr. Roth had worked, and from the testimony here of Mr. Roth now, evidently she knew him from 1948 on." The court further stated that had the appellant intimated or advised the court that she intended to marry Mr. Brown he would certainly not have induced the appellee to sign the property agreement.

The order was then entered modifying the decree, and recited, among other things, the alleged misrepresentations of the appellant, the most important of which was that "she did not have any marriage plans," and that "in reliance upon said representations, the said G. Wallace Roth was induced to enter into a property settlement agreement dated July 23, 1963." The order further

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* While it does not clearly appear from the record, it is certainly evident that the settlement conferences also covered the question of an amendment of appellant's bill for separate maintenance, making it a bill of divorce, which would be heard without contest.

set out that "likewise in reliance upon said representations, the Court approved said property settlement agreement; that said representations were false in that the said Eleanor B. Roth had prior to and during said pre-trial conferences made plans to marry one George V. Brown of Cleveland, Ohio," and that she married him 31 days after the entry of the decree of divorce. The order stated that "said misrepresentations were a fraud on this Court and likewise fraudulent inducements to G. Wallace Roth resulting in his signing of the aforedescribed property settlement agreement."

The decree provided that the appellee pay to the appellant the sum of money demanded in her petition, and that the motions to strike and dismiss the counter-petition and amended petition be denied; that the decree of divorce and the property settlement incorporated therein be modified by vacating and setting aside paragraphs 5 and 6 of the said property settlement agreement, and that the motion of the appellant for attorney's fees be denied.

In Walters v. Walters, 341 Ill. App. 561, there is a full discussion of the distinction between alimony payable in installments and a gross amount awarded as alimony and incorporated in the decree. The court cites many cases, among them Plaster v. Plaster, 47 Ill. 290, in which case the court said at page 294:

> ". . . where a gross sum is decreed and received for, or in lieu of, alimony, it must be held to be in full discharge and satisfaction for all claim for future support of the wife. . . ."

The Walters case went to the Supreme Court on a certificate of importance and was there affirmed [409 Ill. 298].

In Buck v. Buck, 60 Ill. 241, the court held:

> "Whether the alimony is too high . . . it is not now necessary for us to express an opinion. It was competent for the plaintiff in error to consent to such a decree and having done so, it must remain forever binding on him."

Many other cases are cited in the Walters opinion, all to the same effect, including Plotke v. Plotke, 177 Ill. App. 344, and Maginnis v. Maginnis, 323 Ill. 113. On page 571 the court in Walters stated:

> "That the award may be payable in installments is not determinative of the question as to whether it is gross alimony or periodic alimony. Gross alimony may be payable in installments--whether all cash or all or partly on credit does not affect the essential nature of the transaction. The principle involved is that gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect." [Emphasis in original opinion.]

Also see Kohler v. Kohler, 31 Ill. App.2d 151.

In the instant case, from the property settlement incorporated in the decree there is no question that the award was one of alimony in gross. However, another question is raised by the appellee who contends that even where there has been an agreement between the parties incorporating the money and property which are to be given to the appellant by the appellee, such agreement, even if incorporated in the decree, can be held to be void after it is entered into because of fraud and misrepresentation on the part of the appellant. In this case the charge is made that the appellant made false statements which induced the action of the appellee in entering into the oral agreement and also induced the court to incorporate the oral agreement in the decree of divorce.

In Plavec v. Plavec, 30 Ill. App.2d 345, the court held that upon proper grounds, relief from a final divorce decree,

after 30 days from the entry thereof, may be had upon petition, as provided in section 72 of the Civl Practice Act. The court lays down the rule that generally, a misrepresentation to constitute fraud must relate to a past or existing fact, and not to the future. However, it is noted that in some cases "some promises, not misrepresentations of existing facts, wrongfully entered into with the intention to deceive and for the purpose of obtaining an advantage, may be the basis of equitable relief from a judgment or decree obtained by fraud."

Under this rule, the petitions of the appellee in the instant case could properly be brought under section 72, and the court's ruling denying appellant's motion to dismiss on that ground was correct. In Van Dam v. Van Dam, 21 Ill. 2d 212 [cited in Plavec], the court held that a petition under section 72 of the Civil Practice Act is applicable, and said at page 215:

> "At the outset, therefore, the question arises whether the relief sought by defendant's petition in this cause would have been obtainable under a former bill of review, or bill in the nature of a bill of review. Those bills were, for practical purposes, divided into three general classes: (1) bills for error apparent on the face of the record, (2) bills to review a decree on account of new matter or newly discovered evidence, and (3) bills to impeach a decree for fraud. (Taylor v. Wright, 400 Ill. 179.)"

As we have pointed out, the court found that the representations made by the appellant that she did not have any marriage plans were false, and that at the time and prior to the pre-trial conferences the appellant had made plans to marry one George V. Brown, whom she subsequently married. There is no evidence in the record to support the finding of the court. There is evidence that the appellant had

been acquainted with Brown for a considerable period of time, but there is nothing in the record to show any communication or contact with Brown during the period in question. In order to vacate a decree of this character, embodying a voluntary agreement between parties, it is necessary that the evidence showing false representations must be clear and convincing. No such evidence appears in this case.

The judgment of the Circuit Court is reversed and the original decree entered on July 25, 1963, is reinstated in full.

REVERSED.

DRUCKER, J., and ENGLISH, J., concur.

52159

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
	)	
vs.	)	COOK COUNTY.
	)	
WILLIE OSBORNE,	)	HON. EDWARD J. EGAN,
	)	Presiding Judge.
Defendant-Appellant.	)	

101 I.A. 2-4/30

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was indicted for the crime of unlawful sale of narcotics and, after a bench trial, was found guilty of the lesser included crime of unlawful possession for which he was sentenced to a term of two to seven years in the penitentiary. He prosecutes this appeal, contending that the sentence imposed was excessive and praying that this court reduce the sentence to a term of not less than two years (which is the statutory minimum which may be imposed upon a finding of guilty of unlawful possession) nor more than two years and one day.

On September 16, 1966, after a bench trial, defendant was found guilty under this indictment of the unlawful sale of narcotics. He was sentenced to a term of six to ten years in the penitentiary on that finding. On October 31, 1966, the trial judge vacated the finding of guilty of sale, although the court stated he was convinced of defendant's guilt of the sale, and also vacated the sentence theretofore imposed. The court then found defendant guilty of the lesser included crime of possession of narcotics and sentenced him to a term of four to seven years in the penitentiary. On December 13, 1966, the court again vacated the sentence of four to seven years and imposed the sentence involved in this appeal.

The facts which led to defendant's conviction are briefly that the management of defendant's employer, the Inland Steel Container Corporation, received information concerning narcotics activity in the plant and retained a private detective agency to investigate the matter. An undercover detective of the agency was placed in

the plant as an Inland employee and subsequently made acquaintance with an Inland employee who was a narcotics addict. The detective was later transferred to the department where defendant worked and subsequently made defendant's acquaintance.

Three narcotics transactions occurred between defendant and the detective within a few days after they met, after which the detective contacted an officer of the Illinois State Narcotics Division and plans were made to apprehend defendant and several other men allegedly involved in narcotics activity. Defendant made a sale of marijuana to the detective, the latter using marked money supplied by the Narcotics Division Officer, after which defendant and three other men were placed under arrest.

The hearing in aggravation and mitigation revealed that defendant was 34 years old, married and had five children. He had been employed by Inland Steel for ten years at an annual salary of $11,000. It further appears that defendant had previously been convicted of burglary, attempted rape, assault with intent to commit a lewd act, and carrying a concealed weapon; he also was placed under supervision for the possession of marijuana two years prior to the instant conviction.

The imposition of a sentence is peculiarly within the discretion of the trial court and a reviewing court will not interfere unless that discretion has clearly been abused. People v. Walewski, 91 Ill. App. 2d 42; People v. Smice, 92 Ill. App. 2d 83. It is apparent from the record that the trial judge did not abuse his discretion in the imposition of the sentence of two to seven years in the penitentiary.

The trial judge, of his own volition, changed the original finding in the case, from guilty of the sale of narcotics, which carries a minimum statutory sentence of ten years, to guilty of possession of narcotics, because he felt the ten year minimum

sentence would be too harsh a penalty to impose under the circumstances; the court commented that he felt defendant was not involved as a "professional" or "wholesale" marijuana peddler. The court also reduced the sentence on two occasions, ultimately setting defendant's sentence at the minimum allowed by statute for possession of narcotics, two years.

It should be further noted that defendant was convicted of both felonies and misdemeanors dating from as early as 1948 through as recently as 1964. While it is true that defendant was steadily employed for ten years at the Inland Steel plant, at an annual salary of $11,000, he was convicted on a morals charge and a concealed weapons charge and was placed on supervision on a possession of narcotics charge during that period. As far as his marital status is concerned, he was separated from his wife at the time of trial and was paying support for his children under court order.

Defendant cites extensively from the case of People v. Lillie, 79 Ill. App. 2d 174, wherein the reviewing court reduced the defendant's sentence, originally set by the trial court at twelve to eighteen years for violations of probation, to a term of five to eighteen years. It is to be noted that the reviewing court did not interfere with the maximum sentence imposed by the trial court, the court specifically making reference to maximum sentences, a defendant's chance of rehabilitation, and the authority of the parole board to terminate the conditional release after a defendant has served the minimum sentence imposed. In light of defendant's past record, the clear evidence of his guilt in this case, his admissions at trial of sales and possession of narcotics other than those in the instant case, and the trial court's concern with defendant's overall circumstances as evidenced by the alteration of the finding of guilt and reduction of the sentence originally imposed, we are

of the opinion that the trial court did not abuse his discretion in setting the maximum term of defendant's sentence at seven years.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., and LYONS, J., concur.

No. 52241 101 I.A.2 4/75

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROLF FORSBERG,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal from the Circuit
	)	Court of Cook County,
MEYER BRAITERMAN, FOUR WHEELS, INC., a Corporation and or Z FRANK INC., an Illinois Corporation,	)	Illinois County Department, Law Division.
	)	
	)	Honorable James D. Crosson.
Defendants-Appellants.	)	

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The defendants prosecute this appeal from an order of the Circuit Court of Cook County entered February 24, 1967, vacating an order of May 10, 1965, that had dismissed the plaintiff's complaint for want of prosecution and reinstating the cause on the trial calendar.

The plaintiff filed his complaint on November 10, 1961, alleging personal injuries suffered in an accident caused by the negligence of the defendants on November 12, 1959. The defendants answered with a general denial and depositions were apparently taken. On May 10, 1965, the cause was called for a pretrial conference and dismissed for want of prosecution when neither side to the suit appeared. That dismissal order read:

"This cause coming on to be heard upon the regular call of cases for pretrial; and the plaintiff having failed to answer said call or otherwise appear in accordance with pretrial rules.

It is hereby ordered that the above entitled cause be and the same is hereby dismissed for want of prosecution under Supreme Court rule No. 19-12 (3).

Enter:
James D. Crosson,
Judge."

On July 29, 1965, after the case was dismissed, James A. Thompson filed his appearance as additional counsel for the plaintiff. From the record it appears that all parties were unaware of the dismissal until October 19, 1966, when Thompson moved to have the cause placed on the trial calendar from which he thought it had been inadvertently omitted.

On January 26, 1967, the plaintiff filed a motion to vacate the order of dismissal and a second motion on February 2, 1967, that was intended to supercede and replace the first. The motions must be construed as petitions under Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1967, ch. 110, par. 72) since they seek relief from a final order more than 30 days after its entry. The affidavits in support of the motions recite that the affiant, David E. Bradshaw, was the attorney for the plaintiff on May 10, 1965, and that on that date he was a member of the Illinois Crime Investigating Commission and was in conference in Springfield with other members of the commission. It states further that the affiant did not have a copy of the Chicago Daily Law Bulletin available to him in Springfield and that his office in Chicago "did not have an

opportunity to observe" the notice of the pretrial conference of the case as they were likewise engaged in matters pertaining to the Crime Commission at that time. Finally, the affidavit claims that since the Crime Commission is a creature of the Illinois legislature, its members are entitled to the privileges conferred upon members of the General Assembly by Supreme Court Rule 14 (3). (Ill. Rev. Stat. 1965, ch. 110, sec. 101.14 (3) (b). That rule provides:

> "It is sufficient cause for the continuance of any action: . . . (b) that the party applying therefor or his attorney, if his presence is necessary for the full and fair trial of the action, is a member of either house of the General Assembly, and then in actual attendance on the sessions thereof, provided, in the case of the attorney, that he was actually employed prior to the commencement of the session."

On February 17, 1967, the defendants moved to strike the plaintiff's motion to vacate, pointing out, among other things, that the affidavit in support of the motion contained numerous conclusions including the unfounded conclusion that a member of the Crime Commission was entitled to the same privileges afforded a member of the legislature by Supreme Court Rule 14. A hearing on both motions was held before Judge Crosson who denied the defendants' motion to strike; vacated his prior order of dismissal and reinstated the cause.

Until 1952, a motion or petition brought under Section 72 of the Civil Practice Act was no more than the former writ of error coram nobis that brought to the attention of the court the existence of a fact which if known at the time of entry of an order, judgment or decree would have presumably precluded its entry. The

Supreme Court expanded that use in the case of Ellman v. DeRuiter, 412 Ill. 285, by concluding at page 292 "that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such power is necessary to prevent injustice." That decision was codified in the 1955 amendments to the Civil Practice Act and since that time it has been generally recognized that a court may provide relief from a final order within two years from its entry in the interest of fairness and justice. Elfman v. Evanston Bus Co., 27 Ill. 2d 609, 613; Washington Mfg. v. American Uniform Rental Co., 73 Ill. App. 2d 49, 53; Mutual Truck Parts Co., Inc. v. Nelson, 69 Ill. App. 2d 30, 34; Stackler v. Village of Skokie, 53 Ill. App. 2d 417, 420.

All cases agree that Section 72 cannot be used to relieve a litigant from the consequence of his own negligence. Brockmeyer v. Duncan, 18 Ill. 2d 502, 505; Piper v. Reder, 70 Ill. App. 2d 141, 144; Till v. Kara, 22 Ill. App. 2d 502, 509.

It is agreed by the parties that notice of the pre-trial conference had appeared in the Chicago Daily Law Bulletin in accordance with local rules. It is also acknowledged that the court had the power to dismiss the cause when the plaintiff failed to attend the conference as provided by Supreme Court Rule 19-12-3 (Ill. Rev. Stat. 1963, ch. 110, sec. 101. 19-12 (3)).

It is the argument of the plaintiff that had the trial court been aware of the fact that his attorney of record, David E. Bradshaw, was a member of the Illinois Crime Commission and engaged in its business on May 10, 1965, that it would have

continued the pretrial conference scheduled for that date. Although there are no cases to support his theory that a member of the Crime Commission should be entitled to the same advantages afforded a member of the General Assembly by Supreme Court Rule 14, we might agree with the plaintiff's logic that the ultimate action of the trial court indicates that a continuance would have been granted had it been aware of the fact of Bradshaw's engagement in Springfield. However, we cannot agree with the plaintiff that his failure to apprise the court of that fact was excused by lack of effective notice.

The Supreme Court recently considered this problem in the case of Esczuk v. Chicago Transit Authority, 39 Ill. 2d 464. In that case, the plaintiff's complaint was dismissed by the Circuit Court of Cook County for want of prosecution when she failed to attend a pretrial conference. As here, there was no suggestion that the dismissal was occasioned by any questionable conduct on the part of the defendants or the court. The dismissal was not discovered until 18 months after its entry when the court files were examined to determine why the case had not reached the trial calendar. A petition to reinstate under Section 72 was brought wherein the plaintiff denied knowledge of both the pretrial conference and of the dismissal. She did not deny that the notice of the pretrial and the dismissal were duly published in the Law Bulletin. The trial court denied the petition but was reversed by the Appellate Court, First Division, partially on the grounds that the plaintiff was not notified of the pretrial or dismissal. The Supreme Court

rejected the plaintiff's contention that the failure to attend the conference was "mere inadvertence" and stated at pages 467 and 468:

> "We do not believe the facts alleged justify relief under section 72. It has long been held that once a court acquires jurisdiction, it is the duty of the litigants to follow the case. (Bonney v. McClelland, 235 Ill. 259; Staunton Coal Co. v. Menk, 197 Ill. 369.) We realize that the great volume of litigation in metropolitan centers increases this burden and fairness requires an accommodation between courts and lawyers in matters of notices. Nevertheless the practical administration of justice requires that the litigant undertake the burden of following his case if this be possible."

Likewise, it rejected the conclusion of the Appellate Court that the lack of actual notice was crucial. At page 468 the court said:

> "To adopt the view of the appellate court would be to unduly broaden section 72 to permit or even to compel reinstatement of any case dismissed for want of prosecution within two years of dismissal if evidence of notice could not be affirmately presented. Equity and an ordered concept of justice does not require such a result."

On the basis of the Esczuk decision, we can only conclude that the failure of the plaintiff to attend the pretrial conference on May 10, 1965, if only for the purpose of seeking a continuance, was inexcusable. The subsequent failure to examine the court files for 18 months is further evidence of lack of diligence on the part of the plaintiff to follow the course of his case.

Under the circumstances, it is not necessary to discuss the other matters raised in the defendants' brief. It is our

opinion that the trial court abused its discretion by vacating the prior dismissal and the order of February 24, 1967, will be accordingly reversed.

REVERSED.

MORAN, J. and SEIDENFELD, J. concur.

50887

BERNICE MATTIODA,	)	101 I.A. 2475
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY,
	)	COUNTY DEPT.
OMER L. MATTIODA,	)	DIVORCE DIVISION
	)	
Defendant-Appellant.	)	
	)	
	)	HON. FRED W. SLATER,
	)	JUDGE PRESIDING.

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from orders of the Divorce Division of the Circuit Court, finding the defendant guilty of wilful contempt for failure to pay alimony, child support and mortgage payments in a separate maintenance action. The defendant also appeals from certain orders to pay support, mortgage and arrearages. A motion to dismiss the appeal on the grounds that the defendant-appellant failed to file a sufficient record and abstract and that the notice of appeal was not filed within the time required was made by the plaintiff-appellee and taken with the case. The motion to dismiss the appeal has been considered and is denied.

We must note here that the defendant filed his brief on December 16, 1965, but that the plaintiff did not file her brief until June 18, 1968. We were told during oral argument that the delay was due to the attempt to settle the matter amicably.

The record shows that the parties have been married since 1941, have one married daughter and one daughter, Sharon, who was fourteen years of age in January 1962. In 1952, they purchased a home subject to a mortgage. The parties resided together as husband and wife until about December 28, 1961, and on January 9, 1962, the plaintiff-wife filed the Complaint for Separate Maintenance. The defendant's appearance was filed

by Peter J. Tatoolis, his attorney, although it appears he was not served with summons. An order was entered by Judge William V. Daly on June 28, 1962, after hearing testimony of the parties, awarding the plaintiff $68.00 per week for temporary alimony and for temporary support of the minor child, Sharon. The order further recited that it was predicated upon the representation of the defendant that his present earnings averaged $92.00 per week. The plaintiff was also allowed $150.00 as and for her temporary attorney's fees. On July 2, 1962, Attorney Tatoolis withdrew as defendant's lawyer.

On March 18, 1963, the defendant was adjudged in default for failure to file an answer or otherwise make an appearance and the case was heard ex parte by Judge Herbert R. Friedlund. Mrs. Mattioda, plaintiff, testified that her husband deserted her in December 1961. She also testified that the defendant was in arrears about $1450.00 and had not yet paid her allowance for attorney's fees. Although the plaintiff was not sure how much her husband's take-home pay was, she thought it was over One Hundred Dollars a week. She stated that title to the house was put in a trust with herself as beneficiary and that her husband had placed various mortgages on the house from time to time. Plaintiff also testified that the Apollo Savings and Loan Association sent several letters advising them they would have to pay additional attorney's fees and other expenses if the payments on the mortgage were not made. She said her husband promised to make the payments, but did not. The court allowed plaintiff $50.00 a week for her support and for that of the minor child and $500.00 for her attorney's fees. When plaintiff's counsel argued that plaintiff had to pay $49.50 a month for insurance and $144.50 a month on the mortgage and that the defendant squandered about $20,000.00,

the court stated that $50.00 a week was all he could give her for support on the basis of the defendant's take-home pay. The court also told plaintiff's lawyer to provide in the decree that the defendant convey and quit-claim whatever interest he may have in the real estate.

A decree for separate maintenance was signed by Judge Friedlund on April 10, 1963, in which the defendant was ordered to quit-claim all of his title and interest, if any, to the realty , to his wife; that he pay $1450.00 arrearage on the previous court order for support; that he pay $50.00 per week support for plaintiff and for the minor child; and that he pay $500.00 to plaintiff's counsel for attorney's fees.

One week later, on April 17, 1963, the plaintiff came before Judge Nathan Cohen with a petition for a rule to show cause. Judge Cohen entered an order that an attachment issue against the defendant for his wilful failure to pay $1450.00 support and also his failure to pay the monthly mortgage payments he repeatedly promised to make. On April 29, 1963, the court ordered defendant to pay $80.00 by April 30, and the matter was continued to May 23. On that day, Judge Cohen heard plaintiff's petition for a rule to show cause. The defendant was ordered to continue paying $50.00 a week.

On June 17, 1963, plaintiff filed another petition for a rule to show cause. She alleged that in addition to the $2,207.00 due under the separate maintenance decree as of May 17, the defendant should be required to pay the sum of $1,265.88. On June 21, 1963, an order was entered by Judge Cohen finding that the defendant was in arrears for support in the sum of $1,753.00. The court also found that the

defendant owed $650.00 to the plaintiff's attorney and that the defendant had wilfully failed to comply with the orders of the court. Judge Cohen ordered the defendant to pay $40.00 per week for the support of plaintiff and for the minor child, $100.00 attorney's fees, the sum of $200.00 on his arrearages within ten days, and thereafter the sum of $10.00 per week on support arrearage and $10.00 per week on the arrearage due to counsel fees.

On July 24, 1963, plaintiff again filed a petition for a rule to show cause alleging that the defendant wilfully refused to comply with the orders of the court. An answer was filed by the defendant two days later in which he alleged that he was not guilty of wilful conduct, but rather had paid plaintiff $40.00 per week for support as ordered by Judge Cohen on June 21. He further alleged that the plaintiff was harassing him by bringing a multiplicity of rules to show cause making it impossible for him to comply with the various court orders. On July 29, 1963, Judge Sigmund J. Stefanowicz entered an order upon plaintiff's petition for a rule to show cause ordering the defendant to pay plaintiff an additional $2.00 per week for twenty weeks until the disputed payment of June 22, 1963, was paid.

On August 20, 1963, Judge P. A. Sorrentino heard the matter concerning mortgage payments and school tuition of the minor child. This matter had been heard by Judge Cohen on June 17, 1963, but had been set for rehearing on June 27, then July 26, and finally August 20. Judge Sorrentino found that the defendant had promised to make the mortgage payments and that "[s]aid payments became due by reason that Defendant caused a mortgage to be placed on her [plaintiff's] home and used the

monies mainly for his own personal use and pleasure...." After crediting the defendant with $700.00 he had paid on the mortgage, the Judge found that the defendant was indebted to the plaintiff in the sum of $2,988.38, and was indebted to his daughter, Sharon, for tuition, in the sum of $100.00. The defendant was ordered to pay this arrearage at the rate of $50.00 a month in addition to the arrearage the defendant was already ordered to pay under the order of June 21. Also, the defendant was ordered to pay monthly mortgage payments of $109.50 each month.

A little over two years later, on September 10, 1965, plaintiff filed another verified petition for a rule to show cause. The plaintiff alleged that the defendant caused a mortgage to be placed in the sum of $17,000.00 and although he agreed to pay $144.50 a month he has wilfully refused and failed to do so; that the holder of the mortgage had repeatedly threatened to file foreclosure proceedings and in order to avoid foreclosure the plaintiff was compelled to make payments which she could not afford; and that the mortgage was in default for nonpayment in the sum of $5,810.00, and the defendant was also in arrears for support and attorney's fees in the sum of $2,250.00. On that same day the defendant filed a verified petition and answer in which he alleged, among other things, that plaintiff was aware at all times that the defendant, in Arnone v. Mattioda, 59C 11545, had been ordered under pain of imprisonment to pay $12,000.00 to certain creditors, and that upon failure to pay at least $150.00 per month upon said judgment, the defendant would be put in jail; that the payment of money called for by the various orders came to $117.50 per week out of his total salary of $92.00 per week; and that the plaintiff was employed and earned at least $60.00 per week. The

defendant prayed that the rule to show cause be quashed; that the order requiring him to pay mortgage payments be vacated and set aside; that the support order and decree of separate maintenance and all orders subsequent thereto be declared void; and that since the minor child would reach her majority in October 1965, the order of support should be modified.

It appears from a transcript of the record that the parties appeared before Judge Fred W.Slater on September 9, 1965. The respective attorneys argued about the petitions and orders that had been filed, but no evidence was heard. Afterwards the court stated, "I'm not going to sit here and act as an Appellate Court over all these orders. I'm going to deny, then you can take it all up on appeal. I'm not going to sit here and act as an Appellate Judge." After more argument the court stated "There will be a finding of contempt and stay of execution for twenty-one days. See that he comes in here with some plan that is acceptable. We have to make it a stay of execution until the 20th of October."

An order was signed by Judge Slater on September 10, 1965, reciting that the petition of defendant to vacate all previous orders and the decree of separate maintenance was denied; that the defendant was found to be in arrears to the sum of $8,160.00; that defendant was in contempt of court for wilfully failing to pay this sum; and that defendant be committed to the County Jail. On September 24, 1965, the order of September 10 was changed by Judge Slater. The order stated that after a hearing to show cause it was found that the defendant was guilty of wilful contempt for his refusal to pay $8,160.00 and ordered his imprisonment for six months unless he

should purge himself of contempt. The defendant was imprisoned until released by order of this Court about a month later.

The defendant-appellant appeals from the order of the Circuit Court entered on September 10, 1965, which found him in arrears in the amount of $8,160.00 and committing him to jail; the order of September 24, 1965, committing him to jail for six months; the order entered on September 29, 1965, denying him his right to present instanter his petition for mitigation and offer to purge himself and from the orders of June 10, June 17, and June 21, 1963, as being void.

The order of commitment recites that the defendant is in arrears in the sum of $8,160.00. Part of the arrearage is unpaid installments on the mortgage. We have determined that it was error to include mortgage payments.

At the ex parte hearing in the separate maintenance suit held on March 18, 1963, Judge Friedlund orally told plaintiff's counsel that he should provide in the separate maintenance decree that the defendant quit-claim whatever interest he had in the real estate and that $50.00 a week be fixed for support. When plaintiff's counsel pointed out to the court that in addition to her necessary expenses the plaintiff had to pay $144.50 a month on the mortgage and $49.00 a month on insurance, the court replied that he could not allow the plaintiff any more than $50.00 a week based on the defendant's earnings. Decree for separate maintenance entered on April 10, 1963, found that the plaintiff was the sole owner of the property and the defendant was ordered, among other things, to quit-claim any interest he may have had to his wife. We note that the court did not reserve jurisdiction

in the matter of the mortgage payments, etc., but concluded the matter by ordering the defendant to quit-claim his interest in the house. In a subsequent post-decree order entered by Judge Cohen, an attachment was issued against the defendant which included mortgage payments "which he promised repeatedly to make."

Section 23.2 of the Separate Maintenance Act (Ill. Rev. Stat., 1967, ch. 68, §22 et seq.) provides that the process, practice and proceedings under the Act shall be the same as provided for in the Divorce Act (Ill. Rev. Stat., 1967, ch. 40, §1 et seq.). The Divorce Act provides in Section 7 that the process, practice and proceedings under the Act shall be the same as in other civil cases except as otherwise provided by this Act. As is well known, Section 19 of the Divorce Act provides, in part, that "The court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance... as shall appear reasonable and proper." (Ill. Rev. Stat., 1967, ch. 40, §19).

The cases uniformly hold that an alteration will be made only when the conditions and circumstances of the parties have materially changed since the entry of the original decree. Green v. Green, 86 Ill. App. 2d 362, 229 N.E.2d 565; Gregory v. Gregory, 52 Ill. App. 2d 262, 202 N.E.2d 139. The decree is final as to the circumstances and conditions of the parties as of the date of its entry and the court can, therefore, only consider such changes that have occurred subsequently. Nye v. Nye, 411 Ill. 408, 105 N.E.2d 300.

The record reveals that in addition to requesting support money when the matter of separate maintenance was heard ex parte the plaintiff requested that the defendant be ordered to pay the mortgage payments due on her house. This

request was refused and the decree recited that the defendant quit-claim all his title and interest in the property, if any, to plaintiff. Thus, the matter of mortgage payments was adjudicated against the plaintiff. No evidence was offered to prove that the defendant's circumstances had changed materially since the entry of the decree and we hold that all orders entered thereafter which include mortgage payments due to the plaintiff are void.

We turn now to the arrears in support payments and the order finding the defendant in contempt for failure to comply with the various court orders and the separate maintenance decree. It is well-settled in Illinois that the court has the power to commit defendant to jail for failure to comply with orders and decrees in a separate maintenance suit. De Salvo v. De Salvo, 7 Ill. App. 2d 16, 128 N.E.2d 594 (abstract). A spouse's failure or refusal to pay when he has income or property available which can be used for that purpose is generally regarded as wilful, and justifies an order committing such spouse for contempt. However, the court's power to enforce the payment of support money or attorney's fees by contempt is limited to cases of wilful and contumacious refusal to obey the order of the court. Wick v. Wick, 19 Ill. 2d 457, 167 N.E.2d 207; Mesirow v. Mesirow, 346 Ill. 219, 178 N.E.2d 411. Defendant's failure to pay as ordered is not punishable as contempt when he is without fault unable to pay. Kadlowsky v. Kadlowsky, 63 Ill. App. 292. In determining the propriety of orders in enforcement proceedings it is necessary, however, that each case be viewed in the light of its own peculiar facts. Wick v. Wick, 19 Ill. 2d 457, 461, 167 N.E.2d 207.

The record indicates that the defendant may have been uncooperative and may have caused numerous court appearances by plaintiff and her attorney. However, the record also shows

that the judge who committed the defendant heard no evidence as to whether defendant's failure to pay was a wilful and contumacious refusal to obey the order of the court. In addition the order erroneously includes mortgage payments. An examination of the record suggests the equally plausible explanation that the defendant was unable to comply with the court's orders.[1] Since a party may not be imprisoned for contempt unless his disobedience of court orders is wilful or unless he has voluntarily created the disability for the purpose of avoiding the payment of support, the order committing the defendant to jail for six months must be reversed and remanded.

For the reasons stated, the order committing the defendant to jail is reversed and remanded with directions to hear evidence as to amount of support money defendant has failed to pay and to also determine whether defendant's refusal was wilful and contumacious. Also, that portion of the arrearage due to mortgage payments is not to be included in the computation of what the defendant has failed to pay the plaintiff.

On October 9, 1968, a petition was filed in this court seeking to hold the defendant in contempt of court which was taken with the case. This petition is to be considered by the trial judge in the light of this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

ADESKO AND MURPHY, JJ., CONCUR.

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1. It appears from the record that the defendant has also been involved in another lawsuit where he was ordered to pay $12,000.00 to certain creditors at $150.00 per month. Apparently, if he did not make these payments he would be put in jail.

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM
	)	THE CIRCUIT COURT
vs.	)	OF COOK COUNTY
	)	
EARL JAMISON,	)	
Defendant-Appellant.	)	
	)	HON. IRWIN N. COHEN,
	)	PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Earl Jamison, was indicted for robbery (Ill. Rev. Stat., 1967, ch. 38, §18-1). The case was tried without a jury and the court found the defendant guilty, sentencing him to the Illinois State Penitentiary for a term of five to eight years.

On appeal, the defendant contends that the evidence was so unsatisfactory as to raise a reasonable doubt of his guilt and that the conviction should be reversed.

Evidence introduced by the State reveals that Grace Seel, the complaining witness, was employed as a clerk by the Ideal Cleaners at 3424 West Diversey, Chicago. About ten after eleven o'clock, on the morning of Saturday, July 2, 1966, she stated "a colored fellow came into the store." She said this was unusual because the cleaners had no black customers. The man wore a white shirt and dark trousers. He asked her to fix his trousers which he said were too large. Mrs. Seel told him they had no facilities, but that there was a tailor down the street. Within five minutes he came back and asked her to write down the address of the tailor shop. She wrote down the address on a slip of paper and gave it to him. As she handed the address to him he ordered her to open the cash register and give him the money. She opened the cash register. He went around the counter, took

$12.00 with his left hand while his right hand was inside his shirt, and then left. The police were called and she gave them a description of the man who had just robbed her. About fifteen minutes later, the police brought in the defendant and Mrs. Seel identified him as the man who had robbed the store.

Arturo Rodriguez, who resided at 3416 West Diversey, several doors from the cleaners, testified that he saw the defendant on his porch that morning. Mr. Rodriguez said he did not know the defendant before that morning. The defendant asked him for some water and Mr. Rodriguez gave him some. He said that the defendant sat down in his living room and looked outside. After the defendant left he found a piece of paper on his porch. Mr. Rodriguez gave the piece of paper to the police and later, Mrs. Seel identified the paper as the piece upon which she had written the tailor's address and which she had given the man who had robbed her.

John Szwed, a police officer, testified that he arrested the defendant on a CTA bus about fifteen minutes after he had received the defendant's description from another officer. The arrest took place approximately three and one-half blocks from the cleaner's. Detective Lawrence Evans testified that he saw the defendant at the police station at 12:30 P. M. on the day of the robbery. The detective found $12.00 concealed in the defendant's shorts. He said that Officer Szwed gave him the slip of paper found by Mr. Rodriguez and upon which the tailor's address was written.

The defendant contends that the evidence introduced by the State was conflicting as to several vital facts creating a reasonable doubt as to the defendant's guilt and that, therefore,

the conviction should be reversed. We agree with the defendant that it is the duty of the court to resolve all of the facts and circumstances in evidence on the theory of innocence, rather than guilt, if that reasonably may be done. People v. Bradley, 375 Ill. 182, 185, 30 N.E.2d 636.

The defendant's principal argument appears to be that there were customers in the store when the robbery took place and Mrs. Seel made no outcry. Also, the defendant argues that although Mr. Rodriguez demonstrated in open court how the defendant walked with a definite limp, Mrs. Seel testified that she did not notice anything unusual about the defendant when twice he walked in and out of the store. Much is made of the fact that when the police arrived at the store, Mrs. Seel told them that $30.00 to $45.00 was taken and that the defendant was found to have $12.00 concealed in his shorts and possibly one or two dollars in change. The defendant claims that the record is replete with conflicts which cast doubt as to his guilt.

Having carefully examined the record, we believe that the defendant's position is untenable. The testimony shows that the defendant had one hand under his shirt and that he threatened Mrs. Seel while a few feet away from her. This might explain why she was afraid to make an outcry. As to the discrepancy between the amount of money first reported stolen and the amount of money the defendant had hidden in his shorts, Mrs. Seel testified that on July 5, two days after the robbery, she checked the slips against the cash register and found she was $12.00 short. She notified the police accordingly. Mrs. Seel said that she was too excited after the robbery to audit the tapes and that she waited until after the July 4th holiday to attend to it.

Mrs. Seel not only had the occasion to see the defendant twice, but the slip of paper she gave the defendant was dropped on the Rodriguez porch shortly after the robbery and was identified by both Rodriguez and Mrs. Seel. The identification of the defendant was positive and he was apprehended soon after the robbery. His visit to Mr. Rodriguez in the immediate area of the occurrence further bolsters the State's case. Precise accuracy in the characteristics of the defendant and the exact amount of money stolen is unnecessary where an identification is positive. People v. Miller, 30 Ill. 2d 110, 195 N.E.2d 694. The trial judge saw and heard the witnesses and it was his function to determine their credibility and the weight to be accorded their testimony. Where the evidence is merely conflicting, this court will not substitute its judgment for that of the trier of the fact. People v. Scott, 34 Ill. 2d 41, 215 N.E.2d 452.

For the foregoing reasons, the judgment and conviction of the defendant is affirmed.

AFFIRMED.

ADESKO AND MURPHY, JJ., CONCUR.

(Abstract only)